Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-677

REEVES, INC.,

Petitioner,

vs.

WILLIAM STAKE, RICHARD SAYRE, THOMAS ZELLER, AL SANDVIG, EDWIN GAISER, JOSEPH SIMMONS, ROGER PRUNTY, Members of the South Dakota Cement Plant Commission,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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CITATIONS TO OPINIONS BELOW

The United States District Court for the Western Division of the District of South Dakota entered a Restraining Order dated July 21, 1978, granting petitioner's Request for Injunctive Relief. This Restraining Order is unreported and is printed in the Appendix (App. 27). The opinion of the United States Court of Appeals for the

Eighth Circuit, dated November 7, 1978, is printed in Appendix (App. 35) and is reported as *Reeves, Inc. v. Kelley,* 586 F. 2d 1230 (8th Cir. 1978). The order of the United States Supreme Court, dated May 14, 1979, is printed in the Appendix (App. 43) and is reported as *Reeves, Inc. v. Kelley,* 441 U. S. 939, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979). The opinion of the United States Court of Appeals for the Eighth Circuit, dated August 7, 1979, is printed in the Appendix (App. 44) and is reported as *Reeves, Inc. v. Kelley,* 603 F. 2d 736 (8th Cir. 1979).

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JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 7, 1979 (App. 49).

The petition of Reeves, Inc. for a writ of certiorari was filed on October 25, 1979, and granted on January 14, 1980.

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

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QUESTION PRESENTED

1. Does the State of South Dakota, which owns and operates a cement plant, and which has for many years sold substantial amounts of its product in interstate commerce, violate the Commerce Clause of the United States Constitution by adopting and enforcing a policy which limits the sale of its cement to South Dakota residents first before making cement available for purchase by non-residents of the State of South Dakota?

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitution of the United States of America, Article I, Section 8, Clause 3 provides:

> "Section 8. The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

The South Dakota Constitution, Article XIII, Section 10, states:

> "The manufacture, distribution and sale of cement and cement products are hereby declared to be works of public necessity and importance in which the state may engage, and suitable laws may be enacted by the Legislature to empower the state to acquire, by purchase or appropriation, all lands, easements, rights of way, tracts, structures, equipment, cars, motive power, implements, facilities, instrumentalities and material, incident or necessary to carry the provisions of this section into effect: provided, however, that no expenditure of money for the purposes enumerated in this section shall be made, except upon a vote of two-thirds of the members elected of each branch of the Legislature."

South Dakota Compiled Laws § 5-17-1 (1974) states:

> "The people having adopted amendments to our state Constitution to the effect that the manufacture, distribution, and sale of cement and cement products are works of public necessity and importance in which the

state may engage, it is hereby declared that the manufacture, distribution, and sale of cement and cement products are public purposes impressed with a public use and as such governmental functions subject to regulation by the state." (Source: Session Laws 1919, Ch. 324, § 2.)

South Dakota Compiled Laws § 5-17-2 (1974) prior to its amendment effective April 22, 1979, by "Executive Reorganization Order No. 2 of 1979", 1979 South Dakota Session Laws, Ch. 352, p. 370, provided as follows:

> "There is hereby created a state cement commission. The Commission shall consist of five (5) members to be appointed by the Governor for terms of five (5) years. No more than four (4) members may be members of the same political party. Any member appointed to fill a vacancy arising from other than the natural expiration of the term shall serve only for the unexpired term. The commission shall annually choose from its membership a chairman, vice-chairman, and secretary-treasurer. No member may be removed from office except for cause." (Source: Session Laws 1919, Ch. 324, § 2; 1927, Ch. 199, § 1; 1957, Ch. 287; 1974, Ch. 3, § 35.)

South Dakota Compiled Laws § 5-17-2, as amended April 22, 1979, by "Executive Reorganization Order No. 2 of 1979", 1979 South Dakota Session Laws, Ch. 352, p. 370, §§ 14, 16, 18 (S. D. C. L., Supp. 1979) now provides:

> "The state cement commission is abolished. The South Dakota state cement plant commission is created. The commission shall consist of seven members to be appointed by the Governor. Members shall serve a four-year term. No more than five members shall be members of the same political party. The terms of members of the South Dakota state cement plant commission who are first appointed after the effective date of

this order shall be: two appointed for a term of one year; two appointed for a term of two years; two for a term of three years; and one for a term of four years, and such initial terms shall be designated by the Governor. Any member appointed to fill a vacancy arising from other than the natural expiration of a term shall serve only for the unexpired term, but may be reappointed to a full term. The commission shall annually choose from its membership a chairman, a vice-chairman, and a secretary-treasurer. No member shall be removed from office except for cause."

South Dakota Compiled Laws § 5-17-9 (1974) states:

> "The state cement commission is hereby empowered and authorized to operate the South Dakota state cement plant located at Rapid City, South Dakota, to sell the products produced at said plant, to fix the price of such products and to determine the manner and methods of the terms under which such products shall be sold, to advertise such products to the public in such manner as the commission shall deem proper, and to do all things in the operation of such plant and the sale of its products as the commission may deem necessary or expedient to the successful operation of said plant." (Source: Session Laws 1925, Ch. 282, § 1; 1949, Ch. 220, § 1.)

South Dakota Compiled Laws § 5-17-2.1 (1974) prior to the "Executive Reorganization Order No. 2 of 1979", 1979 South Dakota Session Laws, Ch. 352, p. 370, provided:

> "The state cement commission and the state cement plant under its control shall comprise a principal department of state government."

South Dakota Compiled Laws, Supp., 1979, indicates that South Dakota Compiled Laws § 5-17-2.1 (1974) was superseded by § 5-17-2.3 (Supp. 1979) created by "Execu-

tive Reorganization Order No. 2 of 1979", 1979 South Dakota Session Laws, Ch. 352, p. 370, §§ 15, 19.[1] South Dakota Compiled Laws § 5-17-2.3 (Supp. 1979) now states:

> "The South Dakota cement plant commission shall control and manage the state cement plant, and for reporting purposes only, it is attached to the department of commerce. The South Dakota cement plant commission shall have all quasi-judicial, quasi-legislative, special budgetary and statutory functions previously performed by the state cement commission. The South Dakota cement plant commission shall perform and assume all the statutory, regulatory and other functions of the former state cement commission."

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STATEMENT

Reeves, Inc., the petitioner, is a corporation organized and existing under the laws of the State of Wyoming, with its principal place of business at Buffalo, Wyoming. Reeves is engaged in the sale of concrete and concrete products and conducts its business in a three-county area located in Sheridan, Johnson and Campbell Counties, Wyoming. Reeves supplies approximately 54% of the consumers who purchase concrete within its market area. Petitioner receives 100% of its cement, a necessary ingredient in the production of concrete, from outside the State of Wyoming (App. 4, 15).

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1 It would appear from a reading of "Executive Reorganization Order No. 2 of 1979" that South Dakota Compiled Laws § 5-17-2.1 (1974) was only changed to require that reports from the cement plant commission go through the department of commerce and that the cement plant commission remains a principal department of South Dakota state government.

Respondents are members of the South Dakota Cement Plant Commission, appointed pursuant to *South Dakota Compiled Laws*, § 5-17-2 (Supp. 1979), to administer and control the South Dakota cement plant at Rapid City, South Dakota. The state cement plant commission is a department of state government as set forth in *South Dakota Compiled Laws* § 5-17-2.1 (1974) and *South Dakota Compiled Laws* § 5-17-2.3 (Supp. 1979). The state cement commission (now succeeded by the South Dakota State Cement Plant Commission) was organized in 1919 following passage by the citizens of South Dakota of a constitutional amendment, Article XIII, Section 10, declaring that the manufacture, distribution and sale of cement and cement products are "works of public necessity and importance in which the State may engage." (Article XIII, § 10, Constitution of South Dakota.)

The South Dakota Cement Plant Commission has engaged in interstate commerce. Since the establishment of the state cement plant more than fifty years ago, cement has been manufactured and sold to both consumers residing in the State of South Dakota and consumers residing outside the State of South Dakota (App. 5-6; Pl. Ex. 3, App. 26, Tr. of Hearing at 4). It is the only cement mill in the State of South Dakota. The market area for the sale of cement by the South Dakota Cement Plant Commission to its consumers included the following states in addition to the State of South Dakota: North Dakota, Minnesota, Nebraska, Iowa, Montana, Colorado and Wyoming (Pl. Ex. 3, App. 26, Tr. of Hearing at 4). During the calendar year of 1977, the state cement plant shipped 279,877 tons of cement, or approximately 48% of its total shipment to out-of-state consumers. In 1977, 100,922 tons of

cement were shipped to the State of Wyoming (Pl. Ex. 3, App. 26, Tr. of Hearing at 4).

Since its inception in 1958 and through 1977, Reeves, Inc. has purchased approximately 95% of its cement needs for its operations from the state cement plant in Rapid City, South Dakota (App. 4, 15). For the period including January 1, 1975 through June 30, 1978, Reeves had purchased from the state cement plant the following dollar volumes:

1975	$ 871,000.00
1976	824,000.00
1977	1,172,000.00
1978 (to June 30, 1978) (App. 5)	235,000.00

During the mid-year of 1978, a serious shortage of cement was experienced both regionally and nationally. The shortage was caused by a variety of factors including production problems at the South Dakota cement plant (App. 13). On June 1, 1978, the state cement plant commission, after discussing the cement shortage existing "throughout the country" (App. 13), took the following action:[2]

> "The Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come first serve basis." Minutes of South Dakota Cement Plant, June 1, 1978, p. 3 (App. 13).

As a result of this policy and the continuing cement shortage, the state cement plant commission refused to

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2 The policy was previously expressed at a meeting of the South Dakota Cement Commission held on June 26, 1974 (See Pl. Ex. 1, App. 24-25, Tr. of Hearing at 4).

sell cement to Reeves, Inc., a Wyoming corporation (App. 7, 18). On July 19, 1978, Reeves, Inc. filed its complaint in the United States District Court for the District of South Dakota, Western Division, seeking declaratory and injunctive relief, including a temporary restraining order and preliminary injunction (App. 3-14).

On July 21, 1978, the Honorable Andrew W. Bogue entered a restraining order prohibiting the respondents from refusing to serve the petitioner simply because the petitioner was not an entity located within the boundaries of the state of South Dakota and declaring the policy adopted by the respondents a violation of the Commerce Clause and Privileges and Immunities Clause of the United States Constitution.[3] The Court found no sub-

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3 Following the decision of Judge Bogue on July 21, 1978, the state cement plant commission met on July 27, 1978, and adopted a policy which allocated cement under a "prioritization allocation schedule." This schedule gave first priority in cement to all public improvement projects within South Dakota; second priority to all health care facilities within South Dakota; third priority to all contract commitments within and without the state; and the remaining balance of cement allocated on the basis of any customer's average purchase over the past five years. On August 5, 1978, the commission rescinded its July 27, 1978 policy and adopted the so-called "Fifty Percent Allocation Policy" which allocated cement to any customer, resident or non-resident, on the basis of 50 percent of the average amount purchased by that customer over the previous three years. The State of South Dakota then brought suit against the members of the state cement commission in a South Dakota Circuit Court seeking to enjoin the implementation of that policy. On October 5, 1978, the South Dakota Circuit Court entered its decision finding that the policy violated the South Dakota Constitution and laws. The Circuit Court enjoined the commission from implementing any policy other than a policy which granted a priority to South Dakota

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stantial issues of material fact and consolidated the first hearing as a final hearing and issued a permanent injunction based on the pleading, affidavits and evidence presented at a hearing on July 19, 1978 (App. 27-30).

On appeal, the United States Court of Appeals, Eighth Circuit, remanded the cause to the District Court with directions to vacate the injunction granted to the petitioner, and to dismiss the Complaint for failure to state a claim for relief. Not applying the Privileges and Immunities Clause, the United States Court of Appeals, Eighth Circuit, concluded that the Commerce Clause does not limit South Dakota's power "to choose whether, to whom, and on what conditions to sell its goods." *Reeves, Inc. v. Kelley,* 586 F. 2d 1230, 1232 (8th Cir. 1978) (App. 35-41). Such activity was not considered by the Court of Appeals as the type of activity that the Commerce Clause was enacted and intended to prevent. On November 16, 1978, Andrew W. Bogue, United States District Judge, vacated the injunction issued by the District Court on July 21, 1978, and ordered the action dismissed.

On January 31, 1979, Reeves, Inc. filed a Petition for a Writ of Certiorari to the United States Court of Ap-

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residents. Reeves, Inc. was excepted from the restraining order. The commission apparently observed the Circuit Court order. See Footnote 1. *Reeves, Inc. v. Kelley, et al.,* 586 F. 2d 1230 (8th Cir. 1978) (App. 37). The memorandum decision of the Honorable Robert A. Miller, Circuit Judge, in *William J. Janklow, ex rel. State of South Dakota, et al. v. Kelley, et al.* is unreported and is printed as Appendix A to this brief and the subsequent permanent writ of prohibition and writ of mandamus, dated October 23, 1978, is printed as Appendix B hereto. None of the parties to the South Dakota action filed an appeal.

peals for the Eighth Circuit in the Supreme Court of the United States. On May 14, 1979, the Petition for a Writ of Certiorari was granted and the Judgment of the United States Court of Appeals for the Eighth Circuit was vacated and the case remanded for further consideration in light of *Hughes v. Oklahoma,* 441 U. S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). *Reeves, Inc. v. Kelley,* 441 U. S. 939, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979) (App. 43).

On remand, the United States Court of Appeals for the Eighth Circuit issued its opinion in which it refused to apply *Hughes v. Oklahoma, supra,* and continued to abide "by our previous holding that the Commerce Clause does not prohibit South Dakota 'from participating in the market and exercising the right to favor its own citizens over others.' *Hughes v. Alexandria Scrap Corp.,* 426 U. S. at 810." *Reeves, Inc. v. Kelley,* 603 F. 2d 736, 738-739 (8th Cir. 1979) (App. 44-48). The U. S. Court of Appeals distinguished *Hughes v. Oklahoma, supra,* on the basis that South Dakota had not "attempted" to prevent articles of trade reduced to possession and ownership by private individuals from being shipped and sold in interstate commerce.

On October 25, 1979, Reeves, Inc. again filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The petition was granted on January 14, 1980.

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SUMMARY OF ARGUMENT

I.

By adopting and enforcing a policy to prefer all South Dakota residents over non-residents in the sale of state-owned and state-produced cement, the respondents, members of the South Dakota Cement Plant Commission, directly discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3. State ownership of an article of commerce does not justify significant burdens placed by the state on the interstate commerce of cement. Nor does state ownership of an article of commerce remove it from the limitations imposed under the Commerce Clause. Whether a state imposes burdens upon interstate commerce by placing restrictions on private individuals and businesses or placing restrictions on or through its own governmental agencies, the effect is the same. The state cannot escape the power of the Commerce Clause by changing the form in which it imposes direct burdens upon interstate commerce. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935); *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell*, 424 U. S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976); and *City of Philadelphia v. New Jersey*, 437 U. S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978).

This court long ago recognized that a state cannot hoard its natural resources for the sole or principal use of its citizens where private industry had previously submitted the resources to the channels of interstate commerce. *West v. Kansas Natural Gas Co.*, 221 U. S. 229,

31 S. Ct. 564, 55 L. Ed. 716 (1911); *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923); *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928). As Alaska's ownership of a valuable resource in *Hicklin v. Orbeck*, 437 U. S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978), did not remove discriminatory state action from the limitations of the Privileges and Immunities Clause, neither does South Dakota's ownership of its cement remove the preferential policy for South Dakota residents from review under the Commerce Clause.

Attempts to justify the preferential policy adopted by the state of South Dakota as a marketing decision is contrary to the facts presented. The state of South Dakota was not increasing sales by adoption of the preferential policy since the demand for cement, even in the state of South Dakota, had exceeded the supply available from the cement plant. To equate the adoption of the policy as a marketing decision similar to one performed by private industry ignores the practical realities of economic life. Differences between private enterprise and functions of the state exercisable through its police powers make the comparison unreasonable and do not support a marketing decision. The Commerce Clause creates an area of trade free from interference by the states without implementing legislation by Congress. *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell, supra.* The regulation of interstate commerce in the sale of cement occurred when the preferential policy adopted by the state of South Dakota was enforced. The result was an elimination of competition for the purchase of its cement by consumers in Wyoming, North Dakota, Minnesota, Nebraska, Montana and Colorado. It

was not a marketing decision. It was a decision designed to place the state in economic isolation by direct and deliberate impediment to the free flow of goods in interstate commerce.

II.

The holding in *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976) does not warrant exclusion from review under the Commerce Clause of state action which amounts to economic protectionism. The purchasing activity of Maryland in *Hughes v. Alexandria Scrap Corp., supra,* provided the State of Maryland with the means to accomplish a laudable local and national goal of maintaining a clean environment. However, the actions of the state of South Dakota in adopting a policy preferring its own residents over out-of-state residents in the sale of cement was a means to place the state of South Dakota and its residents in economic isolation. As such the South Dakota Cement Plant Commission placed the parochial economic interests of South Dakota above the nation's economic goals expressed in the Commerce Clause. *Hughes v. Alexandria Scrap Corp., supra,* did not erect a direct and deliberate barrier to the free flow of goods in interstate commerce but sought to promote a legitimate local and national concern in maintaining a clean environment.

III.

Upon Commerce Clause review, the preferential policy of South Dakota fails to pass constitutional muster. The action of the respondents is one of those clear examples referred to by the Court in *City of Philadelphia*

v. New Jersey, supra, in which a state undeniably stops the flow of commerce at the limits of its borders and as a result is *per se* invalid. Subjecting the preferential policy to the rule enunciated in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), there is no valid justification for the imposition of the burden which would be overcome by its benefit to local interests. *Hughes v. Oklahoma,* 441 U. S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979); and *H. P. Hood & Sons v. DuMond,* 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949). Respondents maintain that the original enabling legislation and constitutional amendment impress the cement plant with such works of public necessity as to permit the preference for South Dakota residents. To allow states to engage in the national marketplace during times of shortages of valuable resources and to disrupt the flow of commerce by granting preference to its own citizens will set up the blueprint for states to engage in economic protectionism. When such actions by states are not done to shield citizens from fraud or immorality, or to insure the health and safety of its citizens, but rather to provide them with greater economic opportunity, the state action is inconsistent with the Commerce Clause as interpreted in *Pike v. Bruce Church, Inc., supra; Hughes v. Oklahoma, supra;* and *H. P. Hood & Sons v. DuMond, supra.* The action of the respondents was not the least discriminative alternative to insure usage by its residents of cement during a time when the demand far exceeded the supply. Such economic isolationism is repugnant to the Commerce Clause of the United States Constitution.

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ARGUMENT

I.

State ownership of a valuable resource does not remove a policy of preferential treatment from the negative implications of the Commerce Clause.

This case deals with a state policy instituted and enforced by an agency of the state of South Dakota to prefer all South Dakota residents over non-residents in sales of state-owned and state-produced cement. This state action has placed a significant burden on the interstate commerce of cement. The showing by this petitioner alone indicates that the force and effect of the policy adopted by the South Dakota Cement Commission was not an incidental burden on interstate commerce. Reeves, Inc. was forced to lay off numerous employees and suffered a reduction of 76% of its production capacity. Its principal supply of cement for two of its operations in Wyoming was completely cut off in July of 1978 (App. 19-20).

The Respondents attempt to justify this significant burden on interstate commerce by claiming that the operation of the cement plant was instituted by the State for a public purpose under enabling legislation (*South Dakota Compiled Laws,* § 5-17-1 (1974)), and that the ownership by the state of the article of commerce, in this case the cement, removes it from review and implications of the Commerce Clause.

But state ownership is not the sole criterion for consideration or application of the Commerce Clause to activities by a state. The Supreme Court has traditionally

focused on the effect of the state action on interstate commerce rather than on the type of state activity involved in determining whether the statute involves an impermissible burden on interstate commerce. See *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell,* 424 U. S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976); and *City of Philadelphia v. New Jersey,* 437 U. S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). When a state, as the State of South Dakota, has entered the interstate market with an article of commerce owned and produced by the state, it cannot claim an exclusion from review under the Commerce Clause.

The Commerce Clause is a polestar by which this nation is guided in the federal free trade unit. Judicial review of all state action alleged to be a burden on commerce is necessary to remove state obstacles to commerce and achieve the purpose underlying the Commerce Clause. When focusing on the effect of the state action involved in this case, rather than on the type of state activity involved, it becomes clear that the purpose of the Commerce Clause can only be maintained by a review of state activity in any form which burdens interstate commerce.

In *Baldwin v. G. A. F. Seelig, Inc.,* 294 U. S. 511, 522, 55 S. Ct. 497, 79 L. Ed. 1032 (1935), the Court, quoting *International Textbook Co. v. Pigg,* 217 U. S. 91 (1910) stated that:

> "'[A] state may not in any form or under any guise, directly burden the prosecution of interstate business.'"

The distinction that an article of commerce is state owned or under state control as opposed to being privately owned should be ignored. The question to be answered is

not based on the "niceties of 'title' " but whether the state exercised its power in conformity with the Commerce Clause of the United States Constitution. *Hughes v. Oklahoma,* 441 U. S. 322, 333, 99 S. Ct. 1727, 1735, 60 L. Ed. 2d 250 (1979).

Hughes v. Oklahoma, supra, adds support to long established constitutional principles governing the Commerce Clause expressed in *West v. Kansas Natural Gas Co.,* 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911); *Pennsylvania v. West Virginia,* 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923); and *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928); that a state cannot hoard its resources, *natural or created,* for the sole or principal use of its residents.

This court previously held in *Hicklin v. Orbeck,* 437 U. S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978) that Alaska's ownership of its oil and gas was not a sufficient justification for discrimination against hiring non-residents under a Privileges and Immunities challenge. In fact, the court in that case relied on the Commerce Clause principles to support its holding:

> ". . . *West* and *Pennsylvania v. West Virginia* thus established that the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even principally for that State's residents. *Foster Packing Co. v. Haydel,* 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928), went one step further; it limited the extent to which a State's purported *ownership* of certain resources could serve as a justification for the State's economic discrimination in favor of residents . . ."
>
> • • •

> "*West, Pennsylvania v. West Virginia,* and *Foster Packing* thus establish that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce."
>
> • • •
>
> ". . . Although the fact that a state owned resource is destined for interstate commerce does not, of itself, disable the State from preferring its own citizens in the utilization of that resource, it does inform analysis under the Privileges and Immunities Clause as to the permissibility of the discrimination the State visits upon nonresidents based on its ownership of the resource . . ." 437 U. S. at 532-533, 98 S. Ct. at 2491-2492. (Emphasis in original.)

As state ownership of a valuable resource does not remove state action from review under the Privileges and Immunities Clause, neither does state ownership remove state action from review under the Commerce Clause.

The Respondents claim, and the court below advanced the concept, that the state as owner of the cement was merely making a marketing decision concerning its own products with regard to whom and on what terms it wished to sell its product. However, the record cannot support that the preference granted to South Dakota residents by the South Dakota Cement Commission is the result of a conscious market decision. The Respondents and the Court below erred by assuming something that doesn't exist. At the time Reeves, Inc. filed its action, South Dakota Cement Commission had no surplus of cement. Indeed, the president of the South Dakota Cement Commission had been instructed by the cement plant commission to attempt to buy cement from other sources

to meet contract commitments (App. 13). The respondents claimed that the demand in South Dakota alone exceeded the supply of cement produced by the state cement plant (Tr. of Hearing, at 16; App. 31-32).

The preferential policy could not increase sales because demand for cement far exceeded the supply. By making the preference, the state did not sell any more cement than if it had continued to sell cement out of state. The benefit to be realized by enforcing the preferential policy was not to be gained by the South Dakota Cement Plant itself, but was to provide economic protectionism for the residents of the state of South Dakota. To find that the policy resulted from marketing decisions designed to promote the business of the state cement plant is a "specious" finding.

The equating by the court below of the State's activity in manufacturing and selling cement with private industry ignores the practical realities of economic life. The functions and goals of private enterprise in seeking profits and gains for its own existence are much different than the functions of the state, exercisable through its police powers, serving its citizens. The distinction is even set forth in the enabling legislation of cement plants, *South Dakota Compiled Laws,* § 5-17-1 (1974):

> ". . . [I]t is hereby declared that the manufacture, distribution, and sale of cement and cement products are public purposes impressed with a public use and as such *governmental functions subject to regulation by the state.*" (Emphasis supplied.)

Whether or not private industry would be free to restrict sales in a similar manner as did South Dakota

is not persuasive to excluding state action from Commerce Clause review. The fact that Congress does not exercise its power does not limit the federal power granted under the Commerce Clause to regulate commerce among the states. See *City of Philadelphia v. New Jersey, supra;* and *Raymond Motors Transp., Inc. v. Rice,* 434 U. S. 429, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978).

The Commerce Clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but its own force creates an area of trade free from interference by the states. The Commerce Clause, even without implementing legislation by Congress, is a limitation upon the power of the states. *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell,* 424 U. S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976).

The Court below further erred in finding that "South Dakota has not sought to *regulate* interstate commerce in the sale of cement." 603 F. 2d at 738. (Emphasis in original.) (App. 47). This finding is without foundation in the record. Obviously South Dakota sought to regulate interstate commerce by eliminating competition for the purchase of its cement by consumers in Wyoming, North Dakota, Minnesota, Nebraska, Montana and Colorado. When approximately 48% of its cement was shipped out of state during the year 1977, a facial attempt to significantly reduce out-of-state sales of cement can hardly be described as anything else but an attempt to regulate interstate commerce. Only by regulating the interstate commerce of cement could the cement plant commission accomplish its avowed purpose of serving

South Dakota residents first. The question is not whether or not the commission regulated interstate commerce, it is whether or not the state had the right to do it. The state of South Dakota does not have that right under the Commerce Clause of the U. S. Constitution. Thus, its actions are subject to judicial scrutiny entailing "a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of business involved and the actual effect on the flow of commerce." *Di Santo v. Pennsylvania,* 273 U. S. 34, 44, 47 S. Ct. 267, 271, 71 L. Ed. 524 (1927) (Stone, J., dissenting).

II.

Hughes v. Alexandria Scrap Corp. does not grant immunity to a state from the restrictions of the Commerce Clause when the state action amounts to economic protectionism.

The court below relies heavily on *Hughes v. Alexandria Scrap Corp.,* 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976) to establish the state's right to market the cement without the considerations and limitations which may be imposed by the Commerce Clause. The United States Court of Appeals, Eighth Circuit, states in its opinion below, dated August 7, 1979:

> "South Dakota has not sought to *regulate* interstate commerce in the sale of cement. We conclude that its action is more similar to Maryland's preference for its residents in its entry into the automobile scrap processing market, upheld in *Hughes v. Alexandria Scrap Corp.;* than conduct at which the prohibitions of the Commerce Clause have historically been directed.

> "We therefore abide by our previous holding that the Commerce Clause does not prohibit South Dakota 'from participating in the market and exercising the right to favor its own citizens over others.' *Hughes v. Alexandria Scrap Corp.,* 426 U. S. at 810." *Reeves v. Kelley,* 603 F. 2d at 738-739.

In *Hughes v. Alexandria Scrap Corp., supra,* the court upheld a Maryland statute designed to encourage the disposal of abandoned automobiles through payments of cash bounty to scrap processors even though the distribution of the bounties favored in-state interests. The distribution of the bounties were unequal because documentation requirements were different for out-of-state processors than those imposed on processors with plants in Maryland.

The court below equated the "purchasing" by Maryland in *Hughes v. Alexandria Scrap Corp., supra,* to the "selling" by South Dakota of its cement. However, the contrast of the *Hughes v. Alexandria Scrap Corp.* decision and the case presented here lies in the ultimate purpose served by the actions of the state. The purchasing activity of Maryland in *Hughes v. Alexandria Scrap Corp.* was used as a means to promote and accomplish the state's governmental goal of maintaining a clean environment. In contrast, the actions of the state cement plant commission, in adopting a policy of preferring its South Dakota residents in the sale of cement, were not taken to promote or accomplish any governmental ends of the state itself but to provide its residents with an economic advantage to state-owned resources. Even the majority of *Hughes v. Alexandria Scrap Corp., supra,* recognized that barriers erected based on the economic laws of supply and demand are prohibited by the Commerce Clause:

> ". . . [T]his Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." 426 U. S. at 803, 96 S. Ct. at 2494.

It is acknowledged that under certain circumstances and within certain limits a state may be permitted to favor its own inhabitants in the purchase of goods or services. However, such state action cannot be undertaken for the forbidden purpose of placing the state in economic isolation by direct and deliberate impediment to the free flow of goods in interstate commerce. Respondents base their preferential treatment of South Dakota residents on statutory and constitutional language indicating that the cement plant is endowed with a public purpose. The statute and constitution, however, do not specify what kind of public purpose is involved, nor does it really matter. See *Lacoste v. La. Dept. of Conservation,* 263 U. S. 545, 550, 44 S. Ct. 186, 188, 68 L. Ed. 437 (1924). It is submitted that the action taken by the respondents to limit the interstate transportation of cement in times of shortage is an act of economic protectionism which places South Dakota's parochial economic interests above the nation's economic goals expressed in the Commerce Clause. This is in contrast to *Hughes v. Alexandria Scrap Corp., supra,* which involved a legitimate local and national concern in maintaining a clean environment.

It is recognized that a state may need to purchase items to meet its needs *as a state.* But that concept cannot be extended to mean that a state may purchase to meet all the needs *of its citizens.* A distinction must be made between the manner in which the state agencies or

officers function when advancing governmental services to its citizens, and the manner in which it protects its residents from the economic law of supply and demand. *Hughes v. Alexandria Scrap Corp., supra,* is limited to those instances when a state exercises its police power to promote a goal that may be considered a traditional governmental function. The extension of *Hughes v. Alexandria Scrap Corp., supra,* to state action which burdens interstate commerce for non-governmental objectives, i. e. the economic protection of its citizens, is in error. South Dakota actively and voluntarily participated in the interstate market in the sale of cement to customers in several states. The vitality of its business is even related to its sales to non-residents. The restraining order of July 21, 1978, issued by Judge Bogue in the District Court states:

> "The Court is aware of the interest and desires of the defendants to satisfy both the residents of South Dakota and of out-of-state residents. It realizes that the defendants are cognizant of the fact that non-residents have, in the past, been loyal users of South Dakota cement, to the financial benefit of South Dakota . . ." *Reeves, Inc. v. Kelley,* Restraining Order at 2 (D. S. D. July 21, 1978) (App. 28).

It is submitted that South Dakota preempted private enterprise on the interstate market of cement in its present market area. South Dakota cannot now step in or out of interstate commerce or the national marketplace without having a ripple effect throughout the federal free trade unit. Disruption of supplies of cement from South Dakota create new demands on other sources of cement available throughout the national marketplace. It has been shown earlier in this Argument that the decision of the South Dakota Cement Commission did not result in

any increased sales by the plant inuring to the benefit of the state itself. Rather, a constitutionally impermissible burden was placed on interstate commerce with the express purpose of protecting residents of South Dakota from the increasing demands for cement by non-residents of the state. Such state action is subject to judicial review under the Commerce Clause.

III.

South Dakota's policy of preferring its citizens in the sale of cement is impermissible under rules evolved by the Commerce Clause.

Subjecting to Commerce Clause review the policy of South Dakota granting its citizens a preference in the sale of state-owned cement reveals that the policy imposes an impermissible burden upon interstate commerce in violation of the general rules articulated in previous Commerce Clause cases.

The general test, which was refined in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) was reiterated in *Hughes v. Oklahoma,* 441 U. S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979):

> "Under that general rule we must inquire (1) whether the challenged statute regulates even-handedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." 441 U. S. at 336, 99 S. Ct. at 1736.

It has already been pointed out in this brief that the policy adopted by the South Dakota Cement Commission had more than an incidental effect on interstate commerce and, in fact, resulted in a significant burden on interstate commerce. The petitioner, having to rely solely on the interstate market of cement for the operation of its business, had its principal supply of cement cut off by the action of the respondents. Because of the existing problems in production and the high demand for cement in the area, South Dakota's claim for a preferential treatment resulted in a blockage of the cement outside of the borders of the state except in those instances where previous contract commitments had been made by the cement plant commission.

Such state action was not only a significant burden on interstate commerce, it was a facial discrimination against out-of-state businesses. It was an intentional attempt to insulate the state of South Dakota from outside competition. Its practical effect was to do exactly what it was intended to do—to protect the parochial interests of the state of South Dakota. As an action which undeniably stops the flow of commerce at the limit of a state's borders, the policy is *per se* invalid in accordance with the rule in *City of Philadelphia v. New Jersey,* 437 U. S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978).

This state action cannot be fairly viewed as being directed to legitimate local concerns with incidental effects on interstate commerce. Rather, the action of the respondents was designed to protect the state's economy, not its environment nor any other laudable governmental service. As the policy exists, it is a patent discrimination

against interstate trade and is impermissible under the rulng of *City of Philadelphia v. New Jersey, supra.*

If the court were to examine whether the preferential policy serves a legitimate local purpose, it will be found that the state of South Dakota is not promoting a traditionally recognized local interest. Respondents rely on the South Dakota Constitution, Article XIII, Section 10, adopted by the citizens of South Dakota in 1918 and the subsequent enabling legislation adopted in 1919 (*South Dakota Compiled Laws,* § 5-17-1 (1974)), to assert that the avowed purpose of the formation of the state cement plant commission was for works of public necessity and impressed with a public use for the state of South Dakota. Respondents seek support for this avowed public purpose by referring to *Eakin v. South Dakota State Cement Commission, et al.,* 44 S. D. 268, 183 N. W. 651 (S. D. 1921), which upheld the statutes creating the cement commission and the issuance and sale of bonds for financing the cement plant. The South Dakota Court in 1921 found that:

> "[C]ement and its products are commodities that are necessary to the people of this state; that they cannot be procured through individual effort; that, in the construction of highways, bridges, street paving, sidewalks and public buildings within this state, cement is a necessary material, and for such construction there are required more than 1,000 barrels of cement per day; that cement and cement products are also necessary materials for the construction of homes and other structures not hereinbefore referred to; that the use of cement is rapidly increasing in this state as elsewhere; that a serious shortage in the supply of cement is threatening the people of this state; that there has been a shortage many times during the past two years and at times such shortage has interfered with and delayed both public and private enterprises; that the materials for the making of cement are found in large quantities and at accessible points within this state; that gravel, an essential part of cement construction, is found in abundance and distributed throughout the different portions of this state, thus making practicable the manufacture of cement and cement products within this state; that there are no privately-owned and operated cement plants within this state or within some 175 miles of the borders thereof; and that the manufacture, distribution, and sale of cement and cement products by the state will tend to promote the public welfare, prosperity, and contentment of all the citizens of the state, and will tend to secure a quality of economic opportunity." 183 N. W. at 652.

It could be said that most of the conditions and findings stated in the quotation above were true in July of 1978 when the policy was reaffirmed by the cement commission. However, to accept those findings as proper, legitimate public concerns allowing states to enter the national marketplace and disrupt the flow of commerce by granting preference to its own citizens will set up a blueprint for states to engage in economic protectionism. The states of Texas and Alaska, with their reserves of oil and gas, or Wyoming and Montana, with their reserves of uranium and coal, could substitute their particular resource into the above findings and isolate themselves from national problems of energy shortages and natural resource shortages. The blueprint set forth in *Eakin v. South Dakota State Cement Commission, et al., supra,* does not meet the general test described in *H. P. Hood & Sons v. DuMond,* 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949); and *Pike v. Bruce Church, Inc., supra;* be-

cause it does not seek to insure the health or safety of South Dakota citizens so much as to insure their "economic opportunity". *Eakin,* 183 N. W. at 652. Nor is the purpose to shield the citizens from fraud or immorality so much as it is to "promote the public welfare, prosperity and contentment of all the citizens of the state." *Eakin,* 183 N. W. at 652. This may be a state interest but it cannot be promoted by the state of South Dakota in a fashion which is inconsistent with the Commerce Clause of the United States Constitution.

The restriction sought to be imposed by the cement plant commissioners was not evenhanded because it granted a preference to South Dakota citizens. Obviously, respondents could have adopted an evenhanded allocation program which would have treated all customers the same. Thus, the actions of the South Dakota Cement Commission were not designed to conserve the resource but rather to direct the flow of the resource to the citizens of South Dakota which would have left no surplus cement for out-of-state businesses. The state cannot promote its interests in a way inconsistent with the basic principle that was set forth in *H. P. Hood & Sons, Inc. v. DuMond*:

> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, *and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.*" 336 U. S. at 533, 69 S. Ct. at 662 (emphasis supplied).

The "Fifty Percent Allocation" program which was subsequently adopted by the cement plant commission and

found to be unconstitutional under South Dakota law by the Circuit Court of South Dakota may have provided an evenhanded method of distributing the present supply of cement to all consumers within its area.[4] Since an evenhanded distribution was not employed by means available to the State of South Dakota, the state policy adopting the preferential treatment for its own citizens in the distribution of its state-owned products was impermissible under the Commerce Clause. *Pike v. Bruce Church, Inc., supra.*

The Commerce Clause of the United States Constitution protects the rights of out-of-state consumers to go into the State of South Dakota, without restriction or preference for South Dakota customers, and deal in the national marketplace for cement. This principle does not force South Dakota to enter markets it had not previously entered. It does allow out-of-state residents to enter every marketplace in the United States and be treated the same as a citizen of the marketing state. This principle is recognized in *H. P. Hood & Sons v. DuMond, supra,* that:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs, duties or regulations exclude them. Likewise, *every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.* Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." 336 U. S., at 539, 69 S. Ct., at 665. (Emphasis supplied.)

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4 See Footnote 3 on page 9.

and in *Baldwin v. G. A. F. Seelig, Inc., supra*:

> "To give entrance to (economic protectionism) would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon a theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032 (1935).

—o—

CONCLUSION

The State of South Dakota has sought to take a different trade route than outlined by our forefathers in the Commerce Clause. The State of South Dakota asserts an unconstitutional claim that it can now remove from the marketplace, for the purpose of giving economic advantage to its residents, the development and sale of a resource which it formerly sold in interstate commerce, even though such action causes obvious harm to the citizens of other states. Such economic isolationism is repugnant to the Commerce Clause of the United States Constitution.

For these reasons, the judgment of the United States Court of Appeals, Eighth Circuit, dated August 7, 1979, should be reversed.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

IN CIRCUIT COURT
SIXTH JUDICIAL CIRUIT

State of South Dakota, County of Hughes, ss.

WILLIAM J. JANKLOW, Attorney General of the State of South Dakota, ex rel.: THE ASSOCIATION OF GENERAL CONTRACTORS OF THE STATE OF SOUTH DAKOTA, INC.,—HIGHWAY HEAVY UTILITIES CHAPTER: and THE ASSOCIATION OF GENERAL CONTRACTORS OF SOUTH DAKOTA, INC.—BUILDING CHAPTER,

Plaintiffs,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG, and DAVE JOHNSON, MEMBERS OF THE SOUTH DAKOTA CEMENT COMMISSION,

Defendants,

and

GENERAL CONSTRUCTION COMPANY,

Intervenor,

and

HEARTLAND CONSUMERS POWER DISTRICT and MISSOURI BASIN MUNICIPAL POWER AGENCY,

Intervenor,

and

REDI-MIX DEALERS ASSOCIATION,

Amicus Curiae.

MEMORANDUM DECISION

This is an action in mandamus and prohibition brought by the South Dakota Attorney General and the Association of General Contractors of the State of South Dakota against the members of the South Dakota Cement Plant Commission (Commission).

Generally stated, the plaintiffs seek to prohibit the Commission from selling cement for projects located outside the State of South Dakota unless all of South Dakota's needs and demands are first met. They further seek mandamus to require the Commission to meet and adopt a policy allocating South Dakota's cement in a manner consistent with the provisions of the South Dakota Constitution and statutes.

Upon an appropriate showing by plaintiffs this Court entered alternative writs of prohibition and mandamus and set the matter for hearing on September 1, 1978. At the hearing various parties, as captioned above, were allowed to intervene. After hearing the eviednce presented this Court continued the alternative writs. For the reasons set forth below these writs will now be made permanent and peremptory writs will issue.

FACTS PRESENTED

The South Dakota Cement Plant is a department of this state's government engaged in the manufacture and marketing of cement. The defendant Commission members are appointed, pursuant to statute, to administer and control the plant and its operations.

Because of a combination of many circumstances the plant was unable to produce sufficient cement to meet its customers' orders. Seemingly the situation became

critical, so on June 1, 1978 the Commission adopted a resolution re-affirming its policy " . . . of supplying all South Dakota consumers first and to honor all contract commitments with the remaining volume (of cement) allocated on a first come, first serve basis."

A Wyoming contractor, Reeves, Inc., which was apparently affected by this policy, obtained an order on July 21, 1978 from the U. S. District Court in Rapid City prohibiting the Commission from applying the aforesaid policy against it (Reeves). Inasmuch as the instant action was commenced subsequent to the federal court order in *Reeves,* all orders issued by this Court have specifically exempted and excluded Reeves from their applicability. It perhaps should be mentioned here that the issues before the Federal District Court in *Reeves* (and the two other cases filed subsequent to this action before that court) are different than the specific issues before this Court. The actions in the Federal District Court are premised on alleged violations by the Commission of the commerce clause and privileges and immunities clause of the United States Constitution (Article I, Section 8 and Article IV, Section 2, cl. 1). Those issues are not before this Court, nor have the South Dakota constitutional issues been placed before the Federal District Court. Therefore the courts and the judges thereof are not "at odds" as it might appear at first blush.

Subsequent to the issuance of the Federal Court order (July 27, 1978) the Commission rescinded its policy of giving first preference to South Dakota customers, as in the stated policy above. In its stead the Commission adopted a policy which allocated the cement under

a "prioritization allocation schedule." Under this schedule first priority was given to all public improvement projects within South Dakota; second priority went to all health care facilities; third priority to all cement plant commitments within and without the state. The remaining balance of cement was then to be allocated on the basis of the customers' average purchases over the prior five years.

On August 5, 1978 the Commission rescinded its July 27 policy and adopted a policy which allocated cement on a "prioritization basis". Under this policy all consumers, be they from South Dakota or elsewhere, would be allowed an amount equal to fifty per cent of the average amount purchased by the particular customer over the last three years. This is the so-called "Fifty Per Cent Allocation Policy" which plaintiffs sought to prohibit the Commission from further implementing. It has been alleged and proven that the cement plant will produce approximately 36,000 tons of cement per month during the remaining construction season, of which 16,000 ton would be shipped to non-South Dakota customers.

At the hearing before this Court on September 1, 1978 several witnesses were called. They supported the position of plaintiffs and explained the individual plights that they were in as the result of the Fifty Per Cent Allocation Policy. It is this Court's opinion that the evidence produced has proven: that most if not all of the 36,000 tons per month of cement produced by the cement plant is currently needed in the State of South Dakota for construction and projects within the State; that cement products are commodities necessary to the

people of this State; that cement is necessary in the construction of innumerable public and private works; that cement use is rapidly increasing in this State; that there is a serious shortage in the supply of cement in this State; that shortages have interfered with both public and private enterprises; that there are no privately owned or operated cement plants within this State; that many construction workers' jobs are dependent upon the ability of South Dakota contractors, government, farmers and ranchers and businesses to obtain cement and that many of such enterprises have cut working hours and/or laid off employees as a direct result of their inability to obtain cement from the South Dakota Cement Plant; that the foregoing has a detrimental effect on the economy of the State of South Dakota and its citizens; that delay in public improvement contracts caused by inability of South Dakota contractors to obtain cement has and will cause economic losses to citizens and taxpayers of this State: that for all of these reasons and others alleged and proven by plaintiffs the citizens of the State of South Dakota will suffer irreparable injury.

At the conclusion of the hearing this Court continued the alternative writs and allowed counsel time to submit briefs. In ordering that the writs be continued the previous exemption for Reeves, Inc. was maintained. In addition an exemption was given to customers under previous contracts with the cement plant.

ISSUE PRESENTED

IS THE CURRENT COMMISSION POLICY (FIFTY PER CENT ALLOCATION POLICY) CONSISTENT WITH THE INTENT OF THE SOUTH DAKOTA CONSTITUTION AND STATUTES?

DECISION

The South Dakota Constitution, Article XIII, Section 10, reads:

> The manufacture, distribution and sale of cement and cement products are hereby declared to be works of public necessity and importance in which the state may engage, and suitable laws may be enacted by the Legislature to empower the state to acquire, by purchase of appropriation, all lands, easements, rights of way, tracts, structures, equipment, cars, motive power, implements, facilities, instrumentalities and material, incident or necessary to carry the provisions of this section into effect: provided, however, that no expenditure of money for the purposes enumerated in this section shall be made, except upon a vote of two-thirds of the members elected of each branch of the Legislature.

The 1919 Legislature in adopting the enabling legislation, provided:

> SDCL 5-17-1 The people having adopted amendments to our state Constitution to the effect that the manufacture, distribution, and sale of cement and cement products are works of public necessity and importance in which the state may engage, it is hereby declared that the manufacture, distribution, and sale of cement and cement products are public purposes impressed with a public use and as such governmental functions subject to regulation by the state.

In addition reference must be made to SDCL 5-17-9 which provides:

> The state cement commission is hereby empowered and authorized to operate the South Dakota state cement plant located at Rapid City, South Dakota, to sell the products produced at said plant, to fix the price of such products and to determine the manner and methods of the terms under which such products shall be sold, to advertise such products to the public in such manner as the commission shall deem proper, and to do all things in the operation of such plant and the sale of its product as the commission may deem necessary or expedient to the successful operation of said plant.

Much helpful historical information was furnished to the Court in plaintiffs' brief. Reference is made to the Report of State Cement Commission, December, 1920 and Governor's (Norbeck) Message to the Special Session of the Legislature, June, 1919.

The South Dakota Supreme Court has heretofore had an occasion to hold that ". . . the manufacture of cement, under the conditions existing in the state of South Dakota, is the carrying out of a public purpose." *Eakin v. South Dakota Cement Commission*, 183 N. W. 651 (1921). In *Eakin* the court specifically found and determined:

> 1. That cement and its products are commodities that are necessary to the people of this state;
>
> 2. [T]hat they cannot be procured through individual effort;
>
> 3. [T]hat, in the construction of highways, bridges, street pavings, sidewalks, and public buildings within this state, cement is a necessary material, and for such construction there are required more than 1,000 barrels of cement per day;

4. [T]hat cement and cement products are also necessary materials for the construction of homes and other structures not hereinbefore referred to;

5. [T]hat the use of cement is rapidly increasing in this state as elsewhere;

6. [T]hat a serious shortage in the supply of cement is threatening the people of this state;

7. [T]hat there has been such a shortage many times during the past two years and at times such shortage has interfered with and delayed both public and private enterprises;

8. [T]hat the materials for the making of cement are found in large quantities and at accessible points within this state;

9. [T]hat gravel, an essential part of cement construction, is found in abundance and distributed throughout the different portions of this state, thus making practicable the manufacture of cement and cement products within this state;

10. [T]hat there are no privately owned and operated cement plants within this state or within some 175 miles of the borders thereof; and

11. [T]hat the manufacture, distribution, and sale of cement and cement products by the state will tend to promote the public welfare, prosperity, and contentment of all the citizens of the state, and will tend to secure equality of economic opportunity.

The circumstances present today with increasing demands for and shortages of cement are not dissimilar to those existing at the time of the creation of the cement plant and the holding in the *Eakin* decision.

In view of *Eakin* and all of the facts and circumstances now present, it is this Court's opinion that the Fifty Per Cent Allocation Policy violates the provisions of the South

Dakota Constitution (Article XIII, Section 10) and SDCL 5-17-1 and 5-17-9. The Commission has abused the discretion given to it by 5-17-9 by allowing nearly fifty per cent of the plant's total production to be shipped out of state, to the detriment of South Dakota citizens and taxpayers.

The evidence is clear that a continuation of the Fifty Per Cent Allocation Policy will cause irreparable harm to the citizens and taxpayers of this State, be they farmers, ranchers, business people, contractors and their employees, or other customers of cement products.

Accordingly, the writs of mandamus and prohibition will be made permanent. The Attorney General is directed to prepare proposed findings of fact, conclusions of law and peremptory writs pursuant to the rules of civil procedure.

Dated this 5th day of October, 1978.

BY THE COURT:

/s/ Robert A. Miller
Presiding Circuit Judge

ATTEST:

.....
Clerk of Courts
(SEAL)

APPENDIX B

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

State of South Dakota, County of Hughes, ss:

WILLIAM J. JANKLOW, Attorney General of the State of South Dakota, ex rel. THE STATE OF SOUTH DAKOTA:

THE ASSOCIATION OF GENERAL CONTRACTORS OF THE STATE OF SOUTH DAKOTA, INC.,—HIGHWAY HEAVY UTILITIES CHAPTER: and THE ASSOCIATION OF GENERAL CONTRACTORS OF SOUTH DAKOTA, INC.,—BUILDING CHAPTER,

Plaintiffs,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG, and DAVE JOHNSON, MEMBERS OF THE SOUTH DAKOTA CEMENT COMMISSION,

Defendants,

and

GENERAL CONSTRUCTION COMPANY,

Intervenor,

and

HEARTLAND CONSUMERS POWER DISTRICT and MISSOURI BASIN MUNICIPAL POWER AGENCY,

Intervenor,

and

REDI-MIX DEALERS ASSOCIATION,

Amicus Curiae.

PERMANENT WRIT OF PROHIBITION
AND
WRIT OF MANDAMUS

Plaintiffs, having commenced an action against the Defendants under SDCL 21-30 for a writ of prohibition and under SDCL 21-29 for a writ of mandamus, and said matter having come on before the court for hearing on September 1, 1978; and Plaintiff State of South Dakota being represented by William J. Janklow and Steven L. Zinter, and Plaintiff Association of General Contractors being represented by Ronald W. Banks, and Defendant Commissioners being represented by Donald R. Shultz, and Intervenor General Construction Company being represented by Gary F. Colwill, and Intervenors Heartland Consumers Power District and Missouri Basin Municipal Power Agency being represented by Vincent J. Protsch, and Amicus Curiae Redi-Mix Dealers Association being represented by George Manolis; and the court after hearing the testimony of the witnesses and the arguments and briefs of counsel, and being fully advised in the premises, and having previously entered its Memorandum Decision of October 5, 1978, and the court having previously issued its Findings of Fact and Conclusions of Law; NOW THEREFORE

IT IS HEREBY ORDERED that this Court's October 5, 1978, Alternative Writs of Prohibition and Mandamus be made permanent, and that YOU, TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG, and DAVE JOHNSON, the members of the South Dakota State Cement Commission are HEREBY COMMANDED:

1. To refrain from implementing the Fifty Percent Allocation Policy or any other policy that (with the exception of Reeves, Inc., a wheeling arrangement, or other than contractual obligations existing on August 28, 1978), would require South Dakota cement produced at the South Dakota Cement Plant from being shipped or sold for use in projects located outside of the State of South Dakota, unless all of South Dakota's demands have first been met.

2. To refrain from selling or shipping any cement produced at the South Dakota Cement Plant to buyers (except for Reeves, Inc., a wheeling arrangement, or contractual obligations existing as of August 28, 1978), for use in projects that are not located within the State of South Dakota unless all of South Dakota's demands have first been met.

3. To meet, and adopt a policy of allocating South Dakota cement in such a manner that, (with the exception of Reeves, Inc., and other than contractual obligations existing as of August 28, 1978), is consistent with the intent of SDCL 5-17-1, 5-17-9, and Article XIII, Section 10 of the Constitution that the State Cement Plant sell and distribute its cement for South Dakota's uses first and that any remaining surplus be distributed and sold in a manner to be decided by the Commission.

Dated at Pierre, South Dakota, this 23rd day of October, 1978.

BY THE COURT:

/s/ Robert A. Miller
Circuit Court Judge

ATTEST:

/s/ Euince Cory
Clerk of Courts